



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20543

VIA FEDERAL EXPRESS

Trevor Potter
Caplin & Drysdale
One Thomas Circle, N.W.
Suite 1100
Washington, DC 20005

AUG 14 2007

**RE: MURs 5712 and 5799
Senator John McCain**

Dear Mr. Potter:

Based on complaints filed with the Federal Election Commission (the "Commission") on March 7, 2006 and August 23, 2006, and information supplied by you, the Commission, on February 21, 2007 and April 10, 2007, found that there was reason to believe your client, Senator John McCain, violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that violations have occurred.

The Commission may or may not approve the General Counsel's recommendations. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

You may also request an oral hearing before the Commission. See Commission's "Policy Statement Establishing a Pilot Program for Probable Cause Hearings." 72 Fed. Reg. 7551 (Feb.

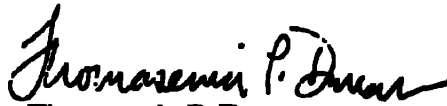
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16. 2007). Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address. The Commission will notify you within 30 days of your request for a hearing as to whether or not the request has been granted.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Adam Schwartz, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,


Thomasenia P. Duncan
General Counsel

Enclosure
General Counsel's Brief

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2)
3 In the Matter of)
4)
5 Senator John McCain)
6)

MURs 5712 and 5799

7 **GENERAL COUNSEL'S BRIEF**

8 **I. INTRODUCTION**

9 On February 21, 2007, the Commission in MUR 5712 found reason to believe that
10 Senator John McCain violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62 by soliciting non-
11 Federal funds in connection with a fundraising event on behalf of Governor Arnold
12 Schwarzenegger and the California Republican Party. On April 10, 2007, the Commission in
13 MUR 5799 found reason to believe that Senator McCain also violated 2 U.S.C. § 441i(e) and 11
14 C.F.R. § 300.62 by soliciting non-Federal funds on behalf of South Carolina Adjutant General
15 Stan Speurs.

16 Based on the following factual and legal analysis, the General Counsel is prepared to
17 recommend that the Commission find probable cause to believe that Senator John McCain
18 violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62 by soliciting non-Federal funds on behalf of
19 candidates for state office.

20 **II. SUMMARY OF FACTS**

21 **A. MUR 5712**

22 In March 2006, Californians for Schwarzenegger 2006, Governor Arnold
23 Schwarzenegger's gubernatorial re-election committee, and the California Republican Party, a
24 State party committee, mailed a fundraising solicitation in connection with an event featuring
25 Senator John McCain. The face of the solicitation features photographs of Senator McCain and
26 Governor Schwarzenegger and the words "SPRING INTO ACTION" "with Governor Arnold

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1 Schwarzenegger and Special Guest Senator John McCain." The same words (absent the
2 Governor's first name) also appear on the top of the second page, under which are boxes for
3 donors to check donation amounts ranging from \$1,000 (for an individual ticket) to \$100,000 (for
4 two seats at the head table with the Governor, a table of ten with premiere seating, tickets to the
5 host committee reception, and photos with the Governor). At the bottom of this page, as well as
6 on the third and final page of the solicitation, is a boxed disclaimer stating:

7 We are honored to have Senator John McCain as our Speaker for this event.
8 However, the solicitation for funds is being made only by Californians for
9 Schwarzenegger and the California Republican Party. In accordance with federal
10 law, Senator McCain is not soliciting individual funds beyond [the] federal limit,
11 and is not soliciting funds from corporations or labor unions.
12

13 On the final page of the solicitation, directly above the disclaimer, are instructions
14 informing contributors (including individuals, businesses, corporations and general PACs) that
15 they may contribute up to \$44,600 to Californians for Schwarzenegger 2006

16 **B. MUR 5799**

17 In August 2006, Spears for Adjutant General, South Carolina Adjutant General Stan
18 Spears' re-election committee, distributed a fundraising solicitation for an event featuring
19 Senator John McCain as a "special guest." The face of the solicitation states "[y]ou are cordially
20 invited to attend a private reception honoring Adjutant General Stan Spears with special guest
21 United States Senator John McCain." The second page consists of reply cards that contain boxes
22 for donors to check donation amounts ranging from \$100 to \$1,000, followed by a boxed labeled
23 "Other." At the bottom of the reply card is a disclaimer stating:

24 Contributions to Spears for Adjutant General are not tax deductible for federal
25 income tax purposes. The solicitation of funds is being made only by Spears for
26 Adjutant General. We are honored to have Senator John McCain as our Special
27 Guest for this event. In accordance with federal law, Senator McCain is not
28 soliciting individual funds in excess of \$2,100 per person, nor is he soliciting
29 corporate, labor union, or foreign national contributions. South Carolina state law

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allows campaign contributions of up to \$3,500 per election cycle. Registered lobbyists please disregard.

The solicitation did not contain any language stating that the entire solicitation was limited to Federally permissible sources.

III. ANALYSIS

Under the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Federal officeholders and candidates for Federal office may not solicit, receive, direct, transfer or spend funds in connection with either Federal or non-Federal elections, unless the funds comply with Federal contribution limits, source restrictions, and reporting requirements. 2 U.S.C. §§ 441i(e)(1)(A) and (B); 11 C.F.R. §§ 300.61 and 300.62. Specifically, a Federal officeholder or candidate, whether in connection with a Federal or non-Federal election, may not raise funds from individuals that exceed the Federal Election Campaign Act of 1971's, as amended (the "Act's") current limit of \$2,300 per election per candidate,¹ and may not raise funds from corporations or labor organizations.² The Commission defines the term "solicit" to mean "to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value." 11 C.F.R. § 300.2(m).³

¹ At the time of the violations, the individual contribution limit was \$2,100.

² A Federal officeholder or candidate for Federal office may, however, attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party, without restriction or regulation. 2 U.S.C. § 441i(e)(3); 11 C.F.R. § 300.64. In the Explanation and Justification for 11 C.F.R. § 300.64, the Commission noted that the rule "is carefully circumscribed and only extends to what Federal candidates and officeholders say at the State party fundraising events themselves ... the regulation does not affect the prohibition on Federal candidates and officeholders from soliciting non-Federal funds for State parties in fundraising letters, telephone calls, or any other fundraising appeal made before or after the fundraising event. Unlike oral remarks that a Federal candidate or officeholder may deliver at a State party fundraising event, when a Federal candidate or officeholder signs a fundraising letter or makes any other written appeal for non-Federal funds, there is no question that a solicitation has taken place that is restricted by 2 U.S.C. § 441i(e)(1)." 70 Fed. Reg. 37,649, 37,653 (June 30, 2005).

³ The Commission adopted this definition of "solicit" as of April 19, 2006, in response to the decision of the United States Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005), *reh'g en banc denied* (Oct. 21, 2005). The Commission specifically declined to make changes to the principles set forth in

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1 The Commission has interpreted this prohibition in the context of particular facts
2 presented in several Advisory Opinions regarding Federal candidates' and officeholders'
3 participation in fundraising events where donations outside of Federal contribution limits and
4 source restrictions were sought. See AO 2003-03 (*Cantor*), AO 2003-36 (*Republican Governors*
5 *Association* ("RGA")); see also AO 2003-37 (*Americans for a Better Country* ("ABC"))
6 (superseded by 11 C.F.R. § 106.6 on Nov. 23, 2004).⁴

7 The facts addressed in the *Cantor* Opinion relate to the appearance of Federal candidates
8 and officeholders in publicity preceding an event at which funds would be raised for state
9 candidates. Specifically, the requestors noted that

10 [T]hey would like Representative Cantor to: (1) attend campaign events, including
11 fundraisers, (2) solicit financial support, and (3) do so orally or in writing.
12 Congressman Cantor would like to participate in their campaigns in this manner.
13 Requestors ask for guidance from the Commission about the degree to which
14 Representative Cantor, as a Federal officeholder and candidate, may engage in
15 State and local election activities.

16
17 In response to the specific question asking whether the Congressman's attendance at the event
18 may be publicized and whether he may participate in the event as a featured guest, the
19 Commission responded:

20 Section 441i(e)(1) and section 300.62 do not apply to publicity for an
21 event where that publicity does not constitute a solicitation or direction of non-
22 Federal funds by a covered person, nor to a Federal candidate or officeholder
23 merely because he or she is a featured guest at a non-Federal fundraiser.

24 In the case of publicity, the analysis is two-fold: First, whether the
25 publicity for the event constitutes a solicitation for donations in amounts

the Advisory Opinions that are applicable here. see *infra*, or to initiate a rulemaking to address the issues based on testimony that the principles articulated in these Advisory Opinions are well-understood and that "the community is complying with them." See 71 Fed. Reg. 13,926, at 13,930-31 (Mar. 20, 2006).

⁴ Counsel for Senator McCain properly notes, in response to the complaint in both matters, that Senator McCain is "in the same position as the requestors" in *Cantor* and *RGA* and therefore may rely on the Advisory Opinions without being subject to sanction. See 2 U.S.C. § 437f (c).

1 exceeding the Act's limitations or from sources prohibited from contributing
2 under the Act; and second, whether the covered person approved, authorized, or
3 agreed or consented to be featured or named in, the publicity. If the covered
4 person has approved, authorized, or agreed or consented to the use of his or her
5 name or likeness in publicity, and that publicity contains a solicitation for
6 donations, there must be an express statement in that publicity to limit the
7 solicitation to funds that comply with the amount limitations and source
8 prohibitions of the Act.

9 AO 2003-03 (Response to Question 3.c) (citations omitted).

10 The Commission revisited the issue of covered persons' participation as featured guests
11 in RGA. The specific question there was:

12 1.b. May a covered individual participate [as a featured guest at an RGA
13 fundraising event] by having his name appear on written solicitations for an RGA
14 fundraising event as the featured guest or speaker?

15
16 After restating the two-step analysis from the *Cantor* Advisory Opinion, the Commission
17 answered:

18 A Federal candidate may not solicit funds in excess of the amount limitation or in
19 violation of the source prohibitions of the Act. If the covered individual approves,
20 authorizes, or agrees or consents to be named or featured in a solicitation, the
21 solicitation must contain a clear and conspicuous express statement that it is
22 limited to funds that comply with the amount limits and source prohibitions of the
23 Act.

24 AO 2003-36 (Response to Question 1.b).

25 Thus, if a Federal officeholder or candidate approves, authorizes, or agrees or consents to
26 be named or featured in a solicitation, then the entire solicitation must be limited to Federally
27 permissible funds. The Commission further explained this restriction in RGA, stating that a
28 disclaimer will not inoculate a covered person who approves his or her appearance in a
29 solicitation that explicitly seeks funds beyond the limits and prohibitions of the Act.
30 Specifically, the Commission explained that a disclaimer is inadequate where, as here, the

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1 publicity or other written solicitation asks for funds in excess of the Act's contribution limits or
2 from prohibited sources:

3 Although Advisory Opinion 2003-03 [*Cantor*] might be read to mean that a
4 disclaimer is required in publicity or other written solicitations that explicitly ask
5 for donations 'in amounts exceeding the Act's limitations and from sources
6 prohibited from contributing under the Act,' that was not the Commission's
7 meaning. The Commission wishes to make clear that the covered individual may
8 not approve, authorize, agree, or consent to appear in publicity that would
9 constitute a solicitation by the covered person of funds that are in excess of the
10 limits or prohibitions of the Act, regardless of the appearance of such a
11 disclaimer.
12

13 AO 2003-36, at n.9.

14 Subsequently, the Commission again considered the involvement of Federal officeholders
15 or candidates in fundraising for non-Federal elections in the *ABC* Advisory Opinion. In *ABC*,
16 which primarily addressed the allocation of expenses by nonconnected committees and was
17 superseded when the Commission enacted new regulations regarding the allocation of certain
18 expenses (*see* 69 Fed. Reg. 68,056, 68,063 (Nov. 23, 2004)), the requestor asked if Federal
19 officeholders or candidates could be named as "honored guests" or "featured speakers" at
20 fundraising events for ABC's non-Federal account. The Commission, citing to both the *Cantor*
21 and *RGA* Advisory Opinions, stated:

22 [A] candidate's consent or agreement to be mentioned in an invitation as an
23 honored guest, featured speaker or host, where that invitation is a solicitation,
24 constitutes a solicitation by the candidate. Thus, if a candidate agrees or consents
25 to be named in a fundraising solicitation as an honored guest, featured speaker or
26 host, or if the invitation constitutes a solicitation for any other reason, then the
27 solicitation must contain a clear and conspicuous statement that the *entire*
28 *solicitation* is limited to funds that comply with the amount limits and source
29 prohibitions of the Act.
30

31 AO 2003-37, at 18 (emphasis added).

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In sum, to comply with the soft money prohibitions of BCRA, Federal officeholders and candidates must adhere to the following requirements if and when they approve, authorize, agree or consent to appear in a written solicitation in connection with the election of state candidates:

1. A Federal officeholder or candidate may appear in written solicitations in connection with the election of state candidates, so long as the solicitation is expressly and entirely limited to amounts and from sources that comply with the Act's contribution limits and source prohibitions.
2. If a written solicitation in connection with the election of state candidates asks for donations, but does not specify an amount, a Federal officeholder or candidate may appear in the written solicitation provided it contains express language stating that the Federal officeholder or candidate is only soliciting amounts that comply with the Act's contribution limits and source prohibitions.
3. However, if a written solicitation in connection with the election of state candidates explicitly asks for donations of funds in amounts exceeding the Act's contribution limits or from prohibited sources, then a Federal officeholder or candidate may not appear in the solicitation regardless of whether there is an express statement limiting the Federal officeholder or candidate's solicitation to funds that comply with the amount limits and source prohibitions of the Act.⁵

⁵ An exception to this bar exists for situations where a Federal officeholder or candidate is "merely mentioned" in the text of a solicitation. Such "mere mention" would not, in and of itself, constitute a solicitation of non-Federal funds by the Federal officeholder or candidate. See AO 2003-36, at 6. At the open meeting at which the Commission discussed *RGA*, Commissioners stressed that this was a narrow exception that would cover, for example, instances where a state candidate sought and received permission from a U.S. Senator to refer in a solicitation to the fact that he or she worked as a staff member to the Senator. See Audio Tape Discussion of AO 2003-36 (Jan. 7, 2004). In any event, the prominent references to Senator McCain as "Special Guest" and "Speaker" for this event go well beyond "mere mention," and an officeholder's appearance in such capacities is specifically addressed in AO 2003-36.

1 The solicitation at issue in MUR 5712 sought donations from "individuals, businesses,
2 corporations and general PACs" in specific amounts of \$1,000 (Individual Ticket), \$10,000
3 (Bronze Sponsor), \$25,000 (Silver Sponsor), \$50,000 (Gold Sponsor), and \$100,000 (Platinum
4 Sponsor). With the exception of the \$1,000 box, the amounts requested exceed the Federal
5 contribution limits for individuals per election, and the solicitation targets corporations, which
6 are prohibited from making contributions under the Act. *See* 2 U.S.C. §§ 441a and 441b.

7 In MUR 5799, the only limitation placed on the solicitation at issue was that it was not
8 seeking contributions from "Guard members or registered lobbyists." The solicitation did not
9 contain any language stating that the entire solicitation was limited to Federally permissible
10 sources. *See id.* In addition, although the solicitation sought specific amounts only up to \$1,000,
11 it also included an "other" space, constituting a failure to limit the solicitation to Federally-
12 permissible amounts. While the solicitation also included a disclaimer indicating that "Senator
13 McCain is not soliciting individual contributions in excess of \$2,100, nor is he soliciting
14 corporate, labor union or foreign national contributions," this disclaimer failed to limit the *entire*
15 solicitation to Federally-permissible amounts. Furthermore, the next sentence advised solicitees
16 that "South Carolina state law allows campaign contributions of up to \$3,500 per election cycle,"
17 the solicitation implicitly sought donations in excess of the Federal contribution limit.

18 It therefore violated BCRA's prohibitions on soliciting non-Federal funds for Senator
19 McCain's name or likeness to appear in both solicitations as a featured guest or speaker since he
20 approved, authorized, agreed, or consented to be featured, or named in, the solicitation. *See*
21 *supra*, pp. 4-5. Moreover, the disclaimers in the solicitations ostensibly limiting Senator
22 McCain's role to the solicitation of Federally permissible funds do not suffice to divorce the
23 Senator from the solicitations of funds prohibited by the Act's contribution limits and source


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prohibitions. *See supra*, pp. 5-7; *see also* AO 2003-03 (Federal office holder may not inoculate a solicitation of non-Federal funds by "reciting a rote limitation, but then encouraging the potential donor to disregard the limitation.") Accordingly, the General Counsel is prepared to recommend the Commission find probable cause to believe that Senator McCain violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62 in connection with both matters.

IV. GENERAL COUNSEL'S RECOMMENDATIONS


- 1) In MUR 5712, find probable cause to believe that Senator John McCain violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62; and
- 2) In MUR 5799, find probable cause to believe that Senator John McCain violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62.

8/13/2007
Date


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